

**Cherry Hill Textiles, Inc. and United Production Workers Union, Local 17-18.** Case 29-CA-15333

October 21, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, RAUDABAUGH, AND  
OVIATT

On March 31, 1992, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs<sup>1</sup> and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.

1. The judge found, among other things, that the Respondent's refusal to arbitrate a grievance constituted a unilateral change in the collective-bargaining agreement and a breach of its duty to bargain collectively with the Union, in violation of Section 8(a)(5). The Respondent excepts, claiming that its delay of arbitration was justified because: (1) a complaint had issued in Case 29-CA-15033 that raised the same issue that was to be presented in the arbitration; (2) the Board had primary jurisdiction over the dispute; and (3) the Respondent's 17-day refusal to arbitrate was de minimis. For the following reasons, we agree with the Respondent that its refusal to arbitrate did not violate the Act.

The Respondent is a New York corporation engaged in the dyeing and finishing of textiles. The Union represents a unit of the Respondent's employees under a May 1, 1990, to April 30, 1993 collective-bargaining agreement. Under the agreement, any grievances arising out of the contract may be submitted by either party to arbitration.

In July 1990,<sup>2</sup> a unit employee was laid off. The employee filed a grievance with the Union and, on August 13, the Union requested arbitration. Arbitration was originally scheduled for October 10. It commenced on October 31, and was to be continued on

November 29.<sup>3</sup> On November 2, the Respondent wrote the Union stating that, because unfair labor practice charges were pending before the Board involving the issue to be arbitrated, it would not, *inter alia*, continue to arbitrate the layoff.<sup>4</sup> On November 19, the Respondent agreed to arbitrate the grievance.<sup>5</sup>

The Board has generally held that the pendency of unfair labor practice charges is not a defense to a refusal to bargain with the union filing those charges. *Zenith Radio Corp.*, 187 NLRB 785, 785 (1971); and *Pine Manor Nursing Home*, 230 NLRB 320, 326 (1977). But see *Airport Aviation Services*, 292 NLRB 823, 830 (1989). It is equally well settled that a refusal to arbitrate a particular grievance or class of grievances will not violate Section 8(a)(5), although it may constitute a breach of contract. *General Chemical Corp.*, 290 NLRB 76, 84 (1988); *A. H. Belo Corp.*, 285 NLRB 807, 807 (1987); and *Indiana & Michigan Electric Co.*, 284 NLRB 53, 54 fn. 7 (1987). Only where the breach of contract amounts to wholesale repudiation of the contract, or substantially infringes on the statutory right of a bargaining representative, will the Board find that Section 8(a)(5) is violated. *Indiana & Michigan Electric Co.*, *supra* at 59-60; and *Paramount Potato Chip Co.*, 252 NLRB 794, 796-797 (1980).

In *Airport Aviation Services*, the Board found that the employer's refusal to discuss grievances involving issues pending before the Board did not violate Section 8(a)(5). Although the respondent in *Airport Aviation* contemporaneously violated Section 8(a)(5) by submitting inaccurate and incomplete responses to the union's request for information, by refusing to provide information on another occasion and by refusing to answer grievances that arose during the term of the expired contract, these violations did not render unlawful the respondent's refusal to discuss the grievances. Thus, as the refusal was limited to a specific class of grievances, did not "obstruct the overall functioning of the process of grievance resolution," and did not threaten the basic bargaining relationship, the Board found that Section 8(a)(5) was not violated. *Id.* at 830.

Here, the Respondent's November 2 letter limited the refusal to arbitrate to one specific grievance involving an issue pending before the Board. The refusal lasted only 17 days. Although the refusal occurred in the context of other unfair labor practices, discussed

<sup>3</sup> The arbitration hearing ultimately resumed on January 14, 1991.

<sup>4</sup> In its November 2 letter, the Respondent additionally informed the Union that because of the pending charges it would not: (1) provide requested information pertaining to the layoff grievance; (2) permit the Union access to its facilities; or (3) remit monthly dues and initiation fees. The judge found, and we agree, that these three acts violated Sec. 8(a)(5).

<sup>5</sup> The judge found that the refusal to arbitrate the grievance lasted from November 2, 1990, until January 14, 1991, as alleged in the complaint. At the hearing, however, the General Counsel amended the complaint to allege that the refusal to arbitrate ended on November 19, 1990. Accordingly, we correct the judge's error.

<sup>1</sup> We reject the General Counsel's argument that the Respondent's exceptions should be rejected under Sec. 102.46 of the Board's Rules and Regulations because the exceptions do not cite the precise portions of the record relied on, and because the Respondent argues facts not in evidence in its brief in support of exceptions. Although the Respondent's exceptions do not conform in all particulars with Sec. 102.46, they are not so deficient as to warrant rejection. Moreover, the General Counsel has neither claimed nor shown prejudice as a result of any deficiency.

<sup>2</sup> All dates are in 1990 unless noted.

supra at footnote 4, there is no claim or proof that the refusal obstructed the overall grievance procedure or undermined the basic bargaining relationship. In these circumstances, as in *Airport Aviation*, we find that the refusal to arbitrate did not substantially repudiate the contract and, thus, did not violate Section 8(a)(5).

2. The Respondent excepts to the judge's finding that the refusal to provide the Union with information it requested in preparation for arbitration violated Section 8(a)(5). The Respondent argues, inter alia, that this allegation should be dismissed because the pleadings do not allege that the Respondent unlawfully withheld information.

We reject this argument. Even where a complaint fails to allege that specific conduct violates the Act, the Board may find a violation provided the allegation was fully litigated at the hearing. *Parkview Furniture Mfg. Co.*, 284 NLRB 947, 972 fn. 111 (1987). Here, while the complaint did not specifically allege that the Respondent unlawfully withheld information, the complaint did allege that certain information was requested and that it was relevant and necessary to the Union's performance as bargaining representative at a pending arbitration.

The refusal-to-provide-information allegation was fully litigated at the hearing. The General Counsel established on direct examination that the information was requested by the Union, that it was relevant, that the Respondent refused to provide it, and that it was subsequently provided 3 months later. The Respondent did not contend that the complaint was insufficient or object to the General Counsel's questions. In fact, it cross-examined the General Counsel's witness on this issue. Thus, the Respondent was on notice concerning the refusal-to-provide-information allegation, litigated the matter, and has not now demonstrated that it was prejudiced by the matters not being specifically alleged in the complaint allegation. In these circumstances, we agree with the judge that the Respondent violated Section 8(a)(5) by refusing to provide the Union with requested information.<sup>6</sup>

3. We adopt the judge's finding that the Respondent violated Section 8(a)(5) by refusing to remit to the Union dues and fees deducted from employees' paychecks. It is well established that the duty to bargain includes a duty to check off and remit union dues if there is a contractual basis for doing so. *Hall Industries*, 293 NLRB 785, 792 (1989). Here, pursuant to a dues-checkoff provision in the collective-bargaining agreement, the Respondent was required to remit dues and fees to the Union on a monthly basis. While the Respondent remitted checked off dues and fees to the

Union until November 2, 1990, it thereafter unilaterally refused to do so. In these circumstances, we agree with the judge that this refusal constituted a unilateral change in the contract and a breach of the duty to bargain in violation of Section 8(a)(5).

Contrary to the Respondent's argument, which our colleague embraces, we do not believe that, in the circumstances of this case, the General Counsel was required to establish that the employees had authorized the deduction of dues. The Respondent never claimed that employees had not authorized deduction of dues. *Indeed, the Respondent, at all times, deducted the dues.* What the Respondent failed to do was to *transmit* the deducted dues to the Union. The assigned reason for this failure was the fact that an entirely different matter was being litigated before the Board. In short, there never was an issue whether the employees had authorized the deduction of dues. Accordingly, we would not dismiss the complaint simply because the General Counsel failed to prove facts relating to a nonissue.

Even were we to agree with our dissenting colleague that record evidence of written employee authorizations is necessary to establish a prima facie case, we find that the pleadings and evidence satisfy this requirement. Thus, the complaint sets forth the contractual requirement that the Respondent remit dues deducted pursuant to written employee authorizations. The Respondent admits this contractual requirement. Further, the record shows that prior to November 2, 1990, the Respondent made monthly remittances to the Union and that it resumed the remittances in March 1991. Given the contractual requirements and the legal requirements of Section 302(c)(4) of the Act, it is reasonable to infer that there were employee authorizations prior to November 2 and after March 1991. The Respondent does not contend that the employees revoked their authorizations on November 2 (assuming they could have done so) and then reinstated them in March 1991. In these circumstances, we conclude that there were employee authorizations between November 2, 1990, and March 1991.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Cherry Hill Textiles, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(b) and renumber the subsequent paragraphs.

2. Substitute the attached notice for that of the administrative law judge.

<sup>6</sup>Member Oviatt agrees with the judge that the Respondent's refusal to provide information violated Sec. 8(a)(5), but relies just on the Respondent's failure to object at the hearing to the complaint's alleged deficiency.

MEMBER OVIATT, dissenting in part.

I agree with the majority, and the judge, that the Respondent violated Section 8(a)(5) by denying the Union access to its facilities and by refusing to provide the requested information. Contrary to my colleagues, however, I would dismiss the allegation that the Respondent violated Section 8(a)(5) by refusing to remit dues and fees to the Union.

It is well settled that an employer may deduct dues from an employee's paycheck only if the employee has authorized deductions, in writing. *Automated Waste Disposal*, 288 NLRB 914, 921 (1988); and *Southland Knitwear*, 260 NLRB 642, 653 (1982). Here, there is neither evidence nor even a complaint allegation that the Respondent had in its possession the written employee authorizations as required by statute and by the parties' collective-bargaining agreement during the pertinent period. It seems to me, however, that a complaint allegation and the evidence to back it up are critical to establishing the General Counsel's case-in-chief, because the employee authorizations are a condition precedent to the operation of the contract clause requiring the deductions.

I do not agree with my colleagues that the complaint's reference to the contractual requirement that the Respondent remit dues deducted "pursuant to employee authorizations" and the Respondent's admission in its answer establish that signed employee authorizations actually existed. The Respondent admitted to the fact of the contractual provision—that is all. And, unlike the majority, I am unwilling to find a violation based on pieced-together external facts and "reasonable inferences." Instead, I view the existence of signed employee authorizations as a necessary element of, and a condition precedent to, establishing the alleged violation. Because the General Counsel failed to prove this element, I would not find that the Respondent violated Section 8(a)(5) by refusing to remit dues and fees to the Union.

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to furnish United Production Workers Union, Local 17-18 (the Union) with seniority data it requests in connection with an employee grievance alleging a layoff out of seniority.

WE WILL NOT fail to bargain in good faith with the Union by denying it access to our plants as provided for in the contract we have with the Union, or by fail-

ing to remit to it initiation fees and dues deducted from your wages as required by that contract.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

## CHERRY HILL TEXTILES, INC.

*Rhonda Schechtman, Esq.*, for the General Counsel.

*Chuck Ellman (BHR & E Associates)*, of South Orange, New Jersey, for Cherry Hill Textiles, Inc.

*Sol Bogen, Esq.*, of New York, New York, for United Production Workers Union, Local 17-18.

## DECISION

### STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The complaint alleges that Cherry Hill Textiles, Inc. (the Respondent) has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by having failed to bargain collectively with United Production Workers Union, Local 17-18 (the Union). The answer filed by the Respondent places in issue whether the Respondent unlawfully (a) refused to furnish the Union with data it requested in connection with a grievance filed with it, (b) refused to remit to the Union dues and initiation fees deducted from employees' wages in accordance with the provisions of the collective-bargaining agreement it has with the Union, (c) denied access to its facilities to union representatives contrary to the provisions of that agreement, and (d) refused, for a protracted period, to arbitrate a grievance under the terms of the agreement.

The hearing was held in New York City on November 26, 1991. Upon the entire record, including my observation of the demeanor of the witness, and after due consideration of the brief filed by the General Counsel, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION-LABOR ORGANIZATION

The Respondent is a New York corporation engaged at its facilities in Brooklyn, New York, in the business of dyeing and finishing textiles. In its operations annually, it meets the Board's nonretail standard for the assertion of jurisdiction.

The Union is a labor organization as defined in Section 2(5) of the Act.

#### II. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. Background

The Union represents a unit composed of all the employees of the Respondent, excluding office clerical employees, professional employees, foreman, guards, managers, and supervisors as defined in the Act. The Respondent and the Union have a collective-bargaining agreement covering that unit. The agreement, effective May 1, 1990, to April 30, 1993, provides, in part, that the Respondent will deduct, from employee wages, initiation fees and union dues and that it will remit those monies to the Union. The agreement further provides that the Union will have access to the Respond-

ent's facilities to meet with unit employees in policing that contract, that layoffs of employees will be done according to departmental seniority, and that disputes as to the applicability of the agreement may be submitted to arbitration by either party.

In July 1990, unit employee Nidio Delgadillo was laid off. He filed a grievance with the Union protesting his layoff.

On August 13, 1990, the Union requested arbitration as to Delgadillo's grievance. On October 2, 1990 it sent a letter to the Respondent requesting to be furnished, for the period June through August, 1990, with the following information—a seniority list, a list of laid-off employees, a list of newly hired employees and a list of all unit employees with their dates of hire and the names of the departments they work in.

A hearing initially was set for October 10, 1990, to arbitrate Delgadillo's grievance. The arbitration hearing was postponed to October 31 at the Respondent's request and later rescheduled for November 29, 1990. Counsel for the Respondent assured the Union that the information requested would be provided to the Union prior to the arbitration of Delgadillo's grievance as to his layoff.

#### B. The Respondent's Reply to the Union's Requests

On November 2, 1990, the Respondent's president wrote the Union, stating:

Because of the recent decision of the labor board<sup>1</sup> we have made the following decisions:

- (1) We will not continue to arbitrate the lay-off Nidio A. Delgadillo, because we are going to trial on that same issue.
- (2) We will not give you the books or records you have asked for.
- (3) We will not allow your union to come into our buildings.
- (4) We will no longer send to you the monthly Union dues or initiation fees.

On November 6, 1990, the Respondent refused access to its facilities to union representatives who had come to meet with unit employees in accordance with the provisions of the collective-bargaining agreement, discussed above.

As stated in its letter to the Union, the Respondent did not remit to the Union the initiation fees and union dues it had deducted from employees' wages under the provisions of the agreement. It did make the remittance but not until March 1991. It also had, until January 14, 1991, refused to arbitrate Delgadillo's grievance, and failed to furnish the Union with the information it had requested.<sup>2</sup>

<sup>1</sup> A complaint had issued in Case 29-CA-15033 on October 10, 1990, based on an unfair labor practice charge filed by another labor organization (International Ladies' Garment Workers' Union, AFL CIO). It alleged that Delgadillo was unlawfully laid off because he supported that labor organization (not the Union in this case). The hearing in that case closed in December 1991. Very recently, I issued a decision in that case.

<sup>2</sup> There is nothing in the record, other than the first sentence in the letter, as to why the Respondent suddenly reneged on its assurances to the Union that it would furnish the information requested. Nor does the record reflect any plausible reason for the Respondent's seemingly bizarre pronouncements that it would stop remitting initiation fees and dues to the Union and that it would prohibit union

#### Analysis

Based on the record in this case, the Union was clearly entitled to the seniority data it requested in connection with Delgadillo's grievance. *Island Creek Coal Co.*, 292 NLRB 480, 487 (1989); *Ohio Power Co.*, 216 NLRB 987, 991 (1975). Correspondingly, the Respondent was obligated to honor the Union's request for that data and its refusal to fulfill that obligation constituted a refusal to bargain collectively with the Union. *Island Creek Coal*, supra.

Similarly, the Respondent's refusal to remit to the Union the initiation fees and dues it deducted and its refusing Union representatives access as described above, along with its refusal to arbitrate Delgadillo's grievance, constituted unilateral changes in the respective terms of the collective-bargaining agreement it has with the Union and contravened its duty to bargain collectively with the Union. See *Hall Industries*, 293 NLRB 785, 792 (1989); *Sacramento Union*, 291 NLRB 540, 550 (1988).

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization as defined in Section 2(5) of the Act.

3. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act by having

(a) Refused to honor the Union's request for seniority data in connection with the grievance filed by a unit employee that he was laid off out of seniority.

(b) Refused to arbitrate the grievance of the employee, although the Union requested arbitration thereon as provided for in the collective-bargaining agreement it has with the Respondent.

(c) Refused to remit to the Union initiation fees and dues it deducted from employees' wages for such transmittal, as required by that agreement.

(d) Refused union representatives access to its facilities despite the requirement in that agreement that it grant such access.

4. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>3</sup>

representatives from entering its facilities to police the collective-bargaining agreement. These steps may have been taken by the Respondent in connection with a representation case election. An election was scheduled for November 20, 1990, in Case 29-RC-7941; the ILGWU had petitioned in that case to oust the Union as the collective-bargaining representative of the Respondent's employees. It is speculative that the Respondent stopped remitting dues and denied the Union access as a less than subtle attempt to block the election. If so, the effort failed. The election was held. The results were later set aside based on an ILGWU objection that the Respondent had failed to furnish it with a list of names and addresses of the eligible voters, as I had noted in the decision referred to in fn. 1 above.

<sup>3</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

## ORDER

The Respondent, Cherry Hill Textiles, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

## 1. Cease and desist from

(a) Refusing to furnish to United Production Workers Union, Local 17-18 (the Union) with seniority data it requested in connection with a grievance filed by a unit employee, protesting a layoff out of seniority, pursuant to the provisions of a collective-bargaining agreement providing for the filing and arbitration of such grievances.

(b) Refusing to arbitrate such type grievance.

(c) Refusing to remit to the union initiation fees and dues deducted from employees' wages for transmittal to the Union, as required by the terms of a collective-bargaining agreement.

(d) Refusing union representatives access to its facilities contrary to the provisions of a collective-bargaining agreement.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.<sup>4</sup>

(a) Post at its Brooklyn, New York facilities copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps have been taken to comply.

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<sup>4</sup>The Respondent has since 1991, ceased refusing to comply with its obligations as described above.

<sup>5</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."